

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ELMER E. ROSS**

Claimant

VS.

**SHERWIN WILLIAMS**

Self-Insured Respondent

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Docket No. 1,007,569

**ORDER**

Respondent appealed the October 12, 2005, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on January 20, 2006, in Wichita, Kansas.

**APPEARANCES**

David H. Farris of Wichita, Kansas, appeared for claimant. Larry Shoaf of Wichita, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, the record includes the July 13, 2004, independent medical evaluation report by Dr. C. Reiff Brown.

**ISSUES**

Claimant alleges he injured his left hip in a January 29, 2002, accident at work and that he later developed a right hip injury as a direct and natural result of the left hip injury. In the October 12, 2005, Award, Judge Clark awarded claimant permanent disability benefits under K.S.A. 44-510e for a 22 percent whole person functional impairment from his bilateral hip injuries. The Judge also concluded that claimant's permanent disability award should not be reduced under K.S.A. 44-501(c) for preexisting functional impairment.

Respondent contends Judge Clark erred. Respondent does not contest that claimant is entitled to receive workers compensation benefits for his left hip injury and the resulting total hip replacement. But respondent does challenge that claimant's present right hip problems are the direct and natural result of the left hip injury. Accordingly, respondent argues claimant is entitled to receive workers compensation benefits for his left hip only. Further, respondent contends claimant had preexisting impairment in his hips and, therefore, respondent should receive a reduction for that preexisting impairment. Consequently, respondent requests the Board to modify the October 12, 2005, Award to grant claimant disability benefits for a 7.5 percent whole person functional impairment for the left hip injury, which takes into account a reduction for preexisting impairment.

Conversely, claimant contends Judge Clark was correct in adopting the opinions of court-appointed independent medical examiner Dr. C. Reiff Brown that claimant sustained injury to both hips directly related to his work activities for respondent and that such injury resulted in a 22 percent whole person functional impairment. Claimant also relies upon the opinion of his expert medical witness, Dr. Pedro A. Murati, that claimant injured his right hip due to overcompensating for the injured left hip. Moreover, claimant argues respondent failed to prove that before his January 2002 accident claimant had an impairment in his hips that was ratable under the *AMA Guides*.<sup>1</sup> Accordingly, claimant requests the Board to affirm the Award.

At oral argument before the Board, the parties narrowed the issues on this appeal to the following:

1. Did claimant injure his right hip as a direct and natural consequence of his left hip injury?
2. What is the nature and extent of claimant's injury and disability?
3. Should claimant's award of permanent disability benefits be reduced pursuant to K.S.A. 44-501(c) for preexisting functional impairment?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be affirmed.

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

On January 29, 2002, claimant fell and injured his left hip. Claimant immediately reported the accident to respondent and began medical treatment. After a total left hip replacement was first recommended by Dr. Bernard Poole, respondent requested a second opinion with Dr. John R. Schurman, II. Consequently, Dr. Schurman examined claimant in July 2002.

Eventually, in April 2003, Dr. Schurman replaced claimant's left hip. Respondent does not challenge that claimant is entitled to receive workers compensation benefits for the left hip injury and resulting total hip replacement.

After the accident, claimant began developing right hip symptoms. X-rays indicate claimant has degenerative arthritis in his right hip and he may eventually require right hip surgery. Claimant contends he has aggravated his right hip as a result of his left hip injury. But respondent challenges that assertion and contends that it is responsible for the left hip injury only.

**1. Did claimant injure his right hip as a direct and natural consequence of his left hip injury?**

The principal issue in this claim is whether claimant aggravated the degenerative arthritis in his right hip as a direct and natural result of the left hip injury. Four doctors provided an opinion regarding claimant's present right hip symptoms. Two directly relate claimant's right hip symptoms to claimant's left hip injury and the other two do not.

Sometime after the January 2002 fall and the resulting left hip injury, claimant began developing right hip symptoms. The record is not entirely clear when those right hip symptoms began. But at the February 2003 preliminary hearing, claimant testified he was then experiencing problems in both hips.

Following the preliminary hearing, claimant returned to Dr. Schurman for treatment. Dr. Schurman's notes do not indicate that claimant complained of right hip pain at visits in February and March 2003. As indicated above, the doctor replaced claimant's left hip in April 2003 and released him to return to work with restrictions in September 2003. But Dr. Schurman's notes from a follow-up appointment in January 2004 indicate claimant advised he was experiencing progressively worsening right hip pain. Despite the temporal relationship between the left hip injury and the start of the right hip symptoms, Dr. Schurman did not believe claimant's right hip symptoms were related to the January 2002 accident or the resulting left hip injury.

In February 2004, claimant also complained to Dr. Pedro A. Murati of bilateral hip symptoms. Dr. Murati concluded claimant was experiencing right hip pain secondary to

degenerative joint disease, which had been aggravated due to compensating for the injured left hip.

In July 2004, Dr. C. Reiff Brown examined claimant at Judge Clark's request. According to Dr. Brown's report to Judge Clark, claimant advised the doctor

the right hip pain started after his left hip discomfort had become more severe immediately prior to the operation. Since the operation he has had increasing pain in the right hip.<sup>2</sup>

Dr. Brown, who acted as a court-ordered independent medical expert and theoretically has no interest in the outcome of this claim, concluded the right hip was aggravated by the injury and treatment to the left hip.

In my opinion this preexisting degenerative arthritic involvement of the left hip was aggravated and rendered symptomatic by the January 31 [sic], 2002 injury sufficiently to require the surgical procedure. It is also my opinion that this injury and the subsequent treatment to the left hip has aggravated and rendered symptomatic the right hip degenerative problem.<sup>3</sup>

And in January 2005, claimant told Dr. Philip R. Mills about his bilateral hip pain. Dr. Mills did not believe claimant's right hip problems were related to claimant's injury at work. Instead, the doctor believed the underlying degenerative arthritis in claimant's right hip was apt to cause claimant trouble and apt to progress regardless of activity.

The greater weight of the evidence establishes that claimant developed right hip pain sometime after the January 2002 fall and that it began to progressively worsen after the left hip surgery. Persuaded by Dr. Brown's opinions, Judge Clark determined the arthritic condition in claimant's right hip was aggravated as a result of the left hip injury. The Board agrees. Like Judge Clark, the Board is persuaded by Dr. Brown's opinion as an independent medical examiner. Claimant had degenerative arthritis in both hips before the January 2002 accident. And it is reasonable to believe that claimant aggravated his right hip while attempting to protect the left hip following the January 2002 accident.

Based upon the above, the Board finds claimant aggravated the arthritis in his right hip as a direct and natural consequence of the left hip injury. Consequently, claimant is entitled to receive workers compensation benefits for the bilateral hip injuries.

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<sup>2</sup> Brown report (July 13, 2004) at 2.

<sup>3</sup> *Id.* at 3.

**2. What is the nature and extent of claimant's injury and disability?**

Claimant continues to work for respondent. Accordingly, claimant requests permanent partial disability benefits based upon his functional impairment rating.<sup>4</sup>

Dr. Brown determined claimant had a 15 percent whole person functional impairment due to the left hip replacement and an eight percent whole person functional impairment for his right hip.<sup>5</sup> On the other hand, Dr. Murati found claimant had a 20 percent whole person functional impairment for the left hip injury and an eight percent whole person functional impairment for the right hip injury.<sup>6</sup> And finally, Dr. Mills rated claimant's left hip injury as comprising a 15 percent whole person impairment but Dr. Mills did not rate the impairment in claimant's right hip. The record does not disclose whether Dr. Schurman rated claimant.

Using the *AMA Guides*, Judge Clark combined the impairment ratings provided by Dr. Brown and determined claimant sustained a 22 percent whole person functional impairment. The Board agrees and adopts that finding as its own.

**3. Should claimant's award of permanent disability benefits be reduced pursuant to K.S.A. 44-501(c) for preexisting functional impairment?**

There is no question that claimant had degenerative arthritis in both hips before the January 2002 accident. But the question presented to Judge Clark was whether respondent established that claimant's degenerative arthritis would have comprised a ratable impairment immediately before his accident. Judge Clark determined respondent failed to satisfy its burden.

The Workers Compensation Act provides that when a preexisting condition is aggravated the award of permanent disability benefits is to be reduced by the amount of preexisting functional impairment. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased

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<sup>4</sup> See K.S.A. 44-510e.

<sup>5</sup> Combining those ratings using the *AMA Guides* yields a 22 percent whole person functional impairment.

<sup>6</sup> Again, combining those ratings using the *Guides* yields a 26 percent whole person functional impairment.

disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.<sup>7</sup>

And functional impairment is defined by K.S.A. 44-510e, as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Consequently, the Act requires that the preexisting condition must be ratable under the *AMA Guides* before an award of compensation may be reduced. The Act does not require that the preexisting condition was actually rated before the subsequent work-related accident. Nor does the Act require that the worker was previously given work restrictions for the preexisting condition. But it is clear that the preexisting condition must have actually comprised a functional impairment as contemplated by the *AMA Guides*.

The Board agrees with Judge Clark that respondent failed to prove what impairment as measured by the *AMA Guides*, if any, claimant would have had for his degenerative arthritic hips immediately before the January 2002 accident. Although Dr. Brown and Dr. Mills both indicated one-half of claimant's functional impairment would be attributable to his preexisting degenerative arthritis, that apportionment appears to be arbitrary rather than the result of an analysis of claimant's condition, history, symptoms, and findings. None of the doctors who testified were asked if either of claimant's asymptomatic hips would have justified a rating under the *Guides* immediately before the January 2002 accident.

The burden of proving a workers compensation claimant's amount of preexisting impairment as a deduction from total impairment belongs to the employer and/or its carrier once the claimant has come forward with evidence of aggravation or acceleration of a preexisting condition.<sup>8</sup>

Consequently, the Award should not be reduced for a preexisting functional impairment.

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<sup>7</sup> K.S.A. 44-501(c).

<sup>8</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), rev. denied 270 Kan. 898 (2001).

**AWARD**

**WHEREFORE**, the Board affirms the October 12, 2005, Award entered by Judge Clark.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David H. Farris, Attorney for Claimant  
Larry Shoaf, Attorney for Respondent  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director